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IN THE

Supreme Court of the United States

No. 267

JACK H. KELLY,
Petitioner,
v.
VINCENT W. KOSUGA,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Jack H. Kelly, by his attorneys, Joseph W. Louisell and Ivan E. Barris, respectfully prays for the issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit affirming the summary judgment rendered in favor of the respondent by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at ... F. 2d ... (1958).[1]

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit, review of which is herein sought, was entered on the 23rd day of June, 1958.

Jurisdiction of this Honorable Court is invoked under Section 1254 of Title 28 U. S. C. A., the pertinent provisions of which read:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> "(2) • • •;
>
> "(3) • • •."

QUESTION PRESENTED

Whether the District Court of the United States for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit erred in holding that the petitioner's affirmative defense, alleging a violation of the Sherman Anti-Trust Act of 1890, was insufficient, within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure and thus properly

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[1] As of the time of the printing of this Petition for Writ of Certiorari, the Opinion of the United States Court of Appeals for the Seventh Circuit was not published.

stricken, where the respondent and the petitioner were both parties to an agreement whose purpose was to fix prices with respect to a commodity which was a part of interstate commerce and where the respondent was seeking to invoke the aid of the Federal District Court to enforce the very agreement which constituted, in itself, a violation of the Sherman Anti-Trust Act of 1890.

STATUTORY PROVISIONS INVOLVED

Section 1, Title 15, of the United States Code provides, in pertinent portions:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court * * *."

STATEMENT OF THE CASE

(Unless otherwise clearly shown by the context, figures in parentheses refer to corresponding pages of petitioner's Appendix heretofore filed with the United States Court of Appeals for the Seventh Circuit.)

The respondent, hereinafter referred to as plaintiff, commenced action against the petitioner, hereinafter referred to as defendant, in the United States District Court for the Northern District of Illinois, Eastern Division, hereinafter referred to as District Court, on September 11, 1956. The suit, predicated upon diversity of citizenship (United States Code, Title 28, Section 1332), was brought

to recover the sum of $37,342.80, which allegedly represented the unpaid balance of the purchase price of fifty (50) carloads of onions sold by the plaintiff to the defendant at the unit price of $960.00 per car, plus storage charges (App. 3a-10a). On March 22, 1957 the defendant filed an Amended Answer, which set up, *inter alia*, certain Affirmative Defenses and also a Counterclaim (App. 11a-19a). Plaintiff then filed a Motion to Strike the Affirmative Defenses in addition to a Reply to the Amended Answer (App. 19a-23a).

The District Court, in pursuance of its Memorandum Opinion of April 24, 1957 (App. 23a-28a), granted the Motion to Strike Affirmative Defenses (App. 28a) and subsequently, on August 15, 1957, denied defendant's Motion for Reconsideration (App. 29a-36a) and reaffirmed its ruling striking the Affirmative Defenses (App. 37a). A Motion for Summary Judgment, filed by plaintiff on August 22, 1957 (App. 38a-42a), and opposed by the defendant (App. 42a-44a), was granted on October 11, 1957 (App. 50a). Judgment in the amount of $37,342.80 with interest and costs was entered on the Complaint in favor of the plaintiff and against the defendant, whereas the defendant's Counterclaim was dismissed (App. 50a).

The plaintiff alleged (App. 3a; Paragraph 3 of Complaint) and the defendant admitted (App. 11a; Paragraph 3 of Amended Answer) that on December 17, 1955, the plaintiff sold to the defendant fifty (50) carloads of United States No. 1 grade yellow globe onions in Chicago storage at $960.00 per car, plus storage charges incurred after the sale. The plaintiff alleged (App. 3a, 4a; Paragraph 4 of Complaint) and the defendant admitted (App. 12a, 13a; Paragraph 4 of Amended Answer) that only the sum of $12,500.00 was paid on the account. The plaintiff sued for the unpaid balance, plus storage charges,

minus the sum realized upon the sale of the thirty-seven (37) cars of onions which had not been withdrawn from storage by the defendant, the total amount sought being $37,342.80 (App. 4a, 5a; Paragraphs 5, 6, 7, 8 and 9 of Complaint.)

The defendant, in his Affirmative Defenses (App. 14a-16a; Paragraph 1 through 8 of Affirmative Defenses) and in certain other affirmative allegtaions contained in the Amended Answer (App. 11a-13a; Paragraphs 3 and 4 of Amended Answer) assumed the legal position that the contract of sale was illegal and that, accordingly, the plaintiff, being *in pari delicto,* could not invoke the assistance of the Court to recover the unpaid portion of the purchase price, plus storage charges (App. 16a; Paragraph 9 of Affirmative Defenses). Succinctly stated, the following allegations of fact were embodied in the Affirmative Defenses and in other affirmative allegations contained in the Amended Answer:

The plaintiff and his associate Sam Siegel, who possessed or controlled some one thousand (1000) cars of onions in cold storage in the area of Chicago, Illinois, and in storage in the country, informed the defendant and other onion growers during the months of November and December 1955, that unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the purpose of depressing both the futures and cash market price of onions (App. 14a, 15a; Paragraph 1 of Affirmative Defenses). The defendant and the other onion growers, fearful of the economic consequences which might befall them in the event the onion market were to be flooded, entered into an agreement with the plaintiff and Sam Siegel to purchase from them two hundred and

eighty-seven (287) carloads of onions, of which the defendant's share was fifty (50) carloads (App. 15a, 11a, 12a; Paragraph 4 of Affirmative Defenses, Paragraph 3 of Amended Answer.) In consideration for the promises of the defendant and of the other onion growers to purchase the two hundred and eighty-seven (287) carloads of onions from the plaintiff and Sam Siegel and to refrain from selling said onions upon the futures market for the balance of the 1955-1956 trading season, the plaintiff and Sam Siegel promised and agreed that they likewise would forbear from selling any onions owned, held or controlled by them upon the futures market for the balance of the trading season (App. 15a, 11a, 12a, Paragraph 3 of Affirmative Defenses; Paragraph 3 of Amended Answer), with it being the express and avowed purpose and object of the agreement, combination, and conspiracy to fix the price and limit the amount of onions to be sold in the State of Illinois (App. 16a; Paragraph 6 of Affirmative Defenses), to create "a false and fictitious market condition" (App. 12a; Paragraph 3 of Amended Answer), and to fix and manipulate the market price of onions and to stabilize said price and, if possible, increase said price (App. 16a; Paragraphs 5 and 8 of Affirmative Defenses), said onions being a part of interstate commerce (App. 16a; Paragraphs 7 and 8 of Affirmative Defenses).

Appeal to the United States Court of Appeals for the Seventh Circuit, hereinafter referred to as Circuit Court, was taken on October 22, 1957 from the District Court's rulings striking the Affirmative Defenses from the Amended Answer and granting the Motion for Summary Judgment with respect to both the Complaint and the Counterclaim (App. 50a). The Opinion and Judgment of the Circuit Court, affirming the holding of the District Court, was filed on June 23, 1958, a true copy of said Opinion being annexed hereto as Appendix A.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Section (b) of Rule 19 of the Supreme Court Rules includes, as a consideration governing review on certiorari, a situation where a Court of Appeals has "decided a Federal question in a way in conflict with applicable decisions of this Court." It is submitted that the decision of the Seventh Circuit Court of Appeals in the instant cause is in conflict with the decision of this Court in *Continental Wall Paper Co. v. Louis Voight and Sons Co.*, 212 U. S. 227, 29 S. Ct. 280 (1908). It is submitted that the interpretation given the *Continental* case, *supra,* by the Court of Appeals below can not be reconciled with either the rationale or the result heretofore announced by this Court. Squarely presented, therefore, on this petition, is the question of whether the rule and the rationale of the *Continental* case are still binding upon the inferior United States Courts, or whether subsequent decisions of this Court have by implication renounced the proposition for which the *Continental* case, *supra,* has stood.

ARGUMENT

Summary of Argument

WHERE THE PLAINTIFF AND THE DEFENDANT ARE BOTH PARTIES TO AN AGREEMENT, COMBINATION, AND CONSPIRACY TO FIX PRICES WITH RESPECT TO A COMMODITY WHICH IS A PART OF INTERSTATE COMMERCE AND WHERE A CONTRACT OF SALE WAS INTENDED BY SAID PARTIES TO BE AND WAS, IN FACT, AN INTEGRAL PART OF THE ILLEGAL SCHEME, THE DEFENDANT, AS THE PURCHASER, MAY ASSERT THE DEFENSE OF ILLEGALITY, PREDICATED UPON THE SHERMAN ANTI-TRUST ACT OF 1890, TO THE ACTION OF THE PLAINTIFF, AS THE SELLER, TO RECOVER DAMAGES RESULTING FROM THE DEFENDANT'S REFUSAL TO TAKE DELIVERY OF THIRTY-SEVEN (37) CARLOADS OF ONIONS AND TO PAY THE OUTSTANDING BALANCE UPON THE PURCHASE PRICE

The District Court, upon motion of the plaintiff (App. 19a, 20a), struck from the Amended Answer the Affirmative Defenses and certain allegations contained in the Amended Answer relating, *inter alia,* to the defense that the plaintiff could not recover the unpaid balance of the purchase price since the contract of sale with respect to the onions in question, being violative of the Sherman Anti-Trust Act of 1890 (U. S. Code, Title 15, Section 1) was unenforceable (App. 37a). In determining whether the District Court erred in making such a ruling and whether the Circuit Court erred in affirming the ruling of the District Court, this Honorable Court, as it previously was incumbent upon said District Court and said Circuit Court, must ascertain whether an "insufficient" defense, within the contemplation of Rule 12(f) of the Federal Rules of Civil Procedure, was alleged, always keeping in mind the fundamental principle that, upon a motion to strike, all

facts well pled by the defendant must be deemed to be true (*Town of River Junction v. Maryland Casualty Co.*, 110 F. 2d 278 (C. C. A. 5) (1940); *Barnidge v. United States*, 101 F. 2d 295 (C. C. A. 8) (1939); *Barron and Holtzoff, Federal Practice and Procedure*, Rules Edition, Volume I, Section 369, published in 1950).

Hence, in accordance with the above stated principle of law, it must be assumed, for the purpose of determining whether a sufficient defense was alleged, that:

(1) The plaintiff and one Sam Siegel, during the months of November and December, 1955, had in their possession or under their control some 600 carloads of onions in cold storage in the area of Chicago, Illinois and an additional 400 carloads of onions in storage in the country (App. 14a, 15a, Paragraph 1 of Affirmative Defenses) and plaintiff and his associate, Sam Siegel, represented to the defendant and to other persons who dealt in or grew onions that they, the plaintiff and Sam Siegel, owned said onions (App. 11a, 12a, Paragraph 3 of Amended Answer).

(2) During the months of November and December, 1955, the plaintiff and Sam Siegel called three meetings in Chicago, Illinois for the purpose of determining whether the defendant and certain other growers of onions who possessed large quantities of onions in the country which were customarily sold through normal trade channels would agree to take and merchandise a portion of the 600 carloads of onions owned or controlled by the plaintiff and Sam Siegel in cold storage in Chicago, Illinois (App. 11a, Paragraph 2 of Amended Answer; App. 14a, 15a, Paragraphs 1 and 2 of Affirmative Defenses).

(3) At said meetings plaintiff and Sam Siegel represented to the defendant and the other onion growers that

unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions (App. 14a, 15a; Paragraph 1 of Affirmative Defenses).

(4) The defendant and the other onion growers feared that the delivery on the futures exchange of a large quantity of storage onions would seriously depress both the futures and the cash onion market, with attendant devastating economic consequences to them (App. 15a; Paragraph 1 of Affirmative Defenses).

(5) At the second of said meetings, held on December 1, 1955 in Chicago, Illinois, the plaintiff and Sam Siegel agreed with the defendant and other onion growers that if the defendant and the other onion growers would purchase a portion of the 600 carloads of onions, the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season (App. 15a; Paragraph 3 of Affirmative Defenses) and the defendant and the other onion growers, for their part, agreed to purchase from the plaintiff and Sam Siegel 287 carloads of onions (App. 15a; Paragraph 4 of Affirmative Defenses).

(6) The defendant, as part of an overall program and as one facet of an overall agreement entered into between the plaintiff and Sam Siegel and the defendant and other onion growers, whereby the latter parties agreed to purchase the 287 carloads of onions and to desist from selling them upon the futures market for the balance of the trading season in consideration of the promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the

balance of the 1955-1956 trading season, agreed to purchase fifty (50) carloads of onions from the plaintiff and Sam Siegel (App. 11a, 12a; Paragraph 3 of Amended Answer).

(7) The avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois (App. 16a; Paragraph 6 of Affirmative Defenses) to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce (App. 16a; Paragraphs 5, 7 and 8 of Affirmative Defenses), and to create a false and fictitious market condition (App. 12a; Paragraph 3 of Amended Answer).[2]

The issue to be resolved scarcely presents a matter of first impression, but rather it may be decided by applying the clear legal principles which were laid down by this

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[2] The Circuit Court, in its Opinion (see Pages 4a, 5a of Appendix A), stated that the allegation "the avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of Interstate Commerce, and to create a false and fictitious market conditon" was a concluson of law, rather than an allegation of fact. Counsel for defendant vigorously take issue with this interpretation. *Webster's New International Dictionary*, at page 160, defines the word "avowed" as meaning "openly acknowledged or declared" and, at page 773, defines the word "express" as meaning "directly and distinctly stated." The plaintiff and Sam Siegel had made it abundantly clear to the defendant and other onion growers that if they did not purchase a large portion of the onions then owned by the plaintiff and Sam Siegel, the plaintiff and Sam Siegel would "dump" large quantities of onions on the futures exchange in order to depress the futures and cash market price of onions (App. 14a, 15a). Confronted with the prospect of economic catastrophy, the defendant and other onion growers agreed to purchase some 287 carloads of onions from the plaintiff and Sam Siegel (App. 11a, 12a, 15a), with it being, as alleged, the actual object or, to use a synonym, purpose of the parties to fix the price of onions in order to stabilize their price or, if possible, in order to increase their price.

Honorable Court in the case of *Continental Wall Paper Co. v. Louis Voight and Sons Co.*, 212 U. S. 227, 29 S. Ct. 280. (1908), principles which the Circuit Court held to be inapplicable to the factual situation presented (see Pages 5a-10a of Appendix A). The Circuit Court, instead, by the simple, although erroneous, process of misconstruing the *ratio decidendi* of the *Constinental* case, *supra,* held that the instant cause is controlled by the holdings of this Court in the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431 (1902), and in its progenies, *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 S. Ct. 398 (1915); *Small Co. v. Lamborn & Co.*, 267 U. S. 238, 45 S. Ct. 300 (1925); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 67 S. Ct. 1015 (1947).

A reading of the *Continental* case, *supra,* pertinent extracts of which are set out below, as well as a reading of the other four cases above mentioned, leads inexorably to the conclusion that the factual situation herein presented closely parallels that which is found in the former case and that its rationale is dispositive of the question under discussion.

In the *Continental* case, *supra,* the plaintiff brought an action against the defendant to recover the sum of $56,762.10, the alleged balance on an account for merchandise sold and actually delivered. The defendant, as one of its defenses, asserted that it, along with the plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act of 1890 and that the contract of sale was an inherent part of the illegal scheme. The plaintiff's demurrer to this defense was overruled by the trial court, which entered judgment for the defendant, and the ruling of the trial court was upheld by the Circuit Court of Appeals (*Continental Wall Paper Company v. Louis*

Voight and Sons Company, 148 F. 939 (C. C. A. 6) (1906). In affirming the judgment the Supreme Court, speaking through Justice Harlan, first distinguished the *Connolly* case, *supra:*

> "But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 545, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431. Let us see what that case was and whether it may not be distinguished from the one now before us.
>
> "The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois, on account of the purchase by the defendant from that company, under contracts made in that state, of sewer pipe known as Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that state. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that, at the time of their respective purchases, that company was in a combination with certain firms, corporations, and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United States and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several states, contrary not only to the anti-trust act of Congress of July 2d, 1890, chap. 647, but contrary to the Illinois anti-trust statute of

January 1st, 1893, forbidding, under penalties, the combination of capital, skill, or acts for certain specified purposes. 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. Ill. Laws 1893, p. 182; Hurd's Rev. Stat. (Ill.) 1899, p. 618, title 'Criminal Code'.

"The defense based upon the principles of the common law was overruled in the Connolly case, the court saying: 'Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe.' Again, after referring to several cases establishing the general principle that a court will not lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded: 'In the present (Connolly) case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not, for that reason, forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts be-

tween the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principle of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe.'

"Turning to the defense based on the anti-trust act of Congress, the court in the Connolly case said: 'Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold,—such property not being, at the time, if the course of transportation from one state to another or to a foreign country. *The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode*

prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.' Further: 'Nor can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute".'.

"We need not here refer to that part of the Connolly case relating to the defense based on the anti-trust act of Illinois; for the court adjudged that act

to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the state, except a named favored class.

"The present case is plainly distiguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in iteslf illegal, **nor part of nor in execution of any general plan or scheme that the law condemned.** *The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason* **alone** *of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained, either upon the principles of the common law or under the anti-trust act of Congress."* (Emphasis by court in boldface; italic emphasis supplied (29 S. Ct. 290, 291).)

The Court then turned its attention to the case before it and enunciated the principle of law which fits the case now at bar like the proverbial glove:

"The case now before us is an entirely different one. The Continental Wall Paper Company seeks,

in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, **it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts to an illegal scheme.** We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up **in execution of the agreements** that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.

"*The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and* **pursuant to which** *the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constitute the forbidden combination.* These considerations make it evident that the present case is different from the Connolly case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground **merely** that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the

Connolly case.[3] *The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends.* We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination

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[3] Likewise, the *D. R. Wilder Mfg. Co.* case, *supra*, *Small Co.* case, *supra*, and *Bruce's Juices* case, *supra*, presented, in each instance, a situation where the defendant was not a party, but rather was a stranger to, the agreement which was violative in the cases of *Wilder* and *Small*, of the Sherman Anti-Trust Act of 1890 and in the case of *Bruce's Juices*, of the Robinson-Pattman Act (U. S. Code, Title 15, Section 13, 13a) and where the defendant was seeking to avoid payment merely because of the illegal character of the seller.

and its plans, or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

"In *Hanauer v. Doane*, 12 Wall. 342, 349, 20 L. ed. 439, 441, this court said: 'The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.'

"In *McMullen v. Hoffman*, 174 U. S. 639, 654, 669, 43 L. ed. 1117, 1123, 1128, 19 Sup. Ct. Rep. 839, 845, 851, where the authorities are reviewed and the whole subject carefully examined, the court said: 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,'—citing many English and American cases. 'The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as

that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.' " (Emphasis by the Court in boldface; italic emphasis supplied (29 S. Ct. 291, 292).).

It is submitted that the following principles of law may be deduced from a reading of the five cases which represent the collective thinking of this Honorable Court in the area of law under discussion:

1. That where the seller and the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act, and the seller seeks to recover under the very contract which constitutes a violation of the Sherman Anti-Trust Act, the illegality "inheres" in the contract and the purchaser may successfully assert this illegality as a defense.

2. That where the seller and parties other than the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act and the seller subsequently enters into a separate and distinct contract of sale with the purchaser, the illegality arising from a violation of the Sherman Anti-Trust Act in the initial agreement is collateral to, and not inherent, in the contract of sale and the purchaser accordingly can not successfully urge, as a defense, the mere illegal character of the seller in a suit brought by the seller under the contract of sale.

While it is readily apparent to counsel for defendant that the distinction between the *Continental* case, *supra,* and the earlier *Connolly* case, *supra,* is that in the former the illegality "inhered" in the agreement upon which the seller sought to recover, whereas in the latter the illegality was collateral to the contract of sale upon which the seller sought to recover, the Circuit Court saw fit in its

Opinion of June 23, 1958 (see Page 8a of Appendix A) to explain the differences in the results reached by characterizing the alleged violations of the Sherman Anti-Trust Act as "vicious" in the *Continental* case, *supra*, and as "innocuous" in the *Connolly* case, *supra*. In this regard, it is submitted that neither the Sherman Anti-Trust Act of 1890 nor the judicial decisions interpreting same recognize that one type of violation of the Sherman Anti-Trust Act of 1890 is more heinous than another type of violation of the Sherman Anti-Trust Act of 1890, once a determination is made that a particular course of conduct constitutes a violation.[4]

When one comprehends the true distinction between the *Continental* case, *supra*, and the *Connolly* case, *supra*, and then indulges, as he must, upon a motion to strike, in the assumption that the averments of fact contained in the Affirmative Defenses and the Affirmative Allegations of the Amended Answer are verity, one is necessar-

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[4] Even if the test to determine whether a violation of the Sherman Anti-Trust Act of 1890 could be successfully urged as a defense in an action brought by the seller were to depend upon the relative seriousness of the violation, a standard of measurement which it is submitted would defy application, certainly, in view of the consistency with which this Court has condemned price fixing as being illegal *per se*, whether the prices fixed be reasonable or not (*United States v. Paramount Pictures*, 334 U. S. 131, 68 S. Ct. 915 (1948); *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305, 76 S. Ct. 937 (1956); *United States v. New Wrinkle Inc.*, 342 U. S. 371, 72 S. Ct. 350 (1952); *United States v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945); *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811 (1940)), the price fixing agreement herein alleged would necessarily have to be regarded as a grave violation of the Sherman Anti-Trust Act of 1890. In this respect, it should be noted that the Circuit Court, in its Opinion of June 23, 1958 (see pages 10a, 11a of Appendix A) intimated, without actually deciding, that the so-called condition of non-delivery was not illegal, notwithstanding the fact that the condition of non-delivery was the means, and understandably so in view of the law of supply and demand, by which the parties sought to stabilize the price of onions and, if possible, to increase their price.

ily impelled to conclude that both the District Court and the Circuit Court erred in holding that the defendant had failed to allege a sufficient defense to the plaintiff's cause of action. The instant record presents a picture where the plaintiff is attempting to recover damages for the breach of the *very* agreement whose avowed purpose and object was to fix and manipulate the price of onions which constituted a part of Inter-state Commerce (App. 11a, 12a, 16a). In other words, in contrast to the situation in the *Connolly* case, *supra,* the plaintiff herein, in order to prove his case, must ask and did ask the District Court to enforce the payment of the price of onions in pursuance of a contract which was intended by the parties to be and which was, in fact, an agreement to fix prices. This is not a situation where the plaintiff and Sam Siegel agreed, conspired and combined to restrain trade in Inter-state Commerce with X, Y, Z, etc., and subsequently the defendant, in a separate, independent and collateral agreement, purchased onions from one of the parties to the illegal combination and conspiracy, the factual situation existing in the *Connolly* case, *supra,* and in two of its three offsprings.[5]

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[5] In the case of *Bruce's Juices, supra,* the plaintiff allegedly was in violation of the Robinson-Pattman Act, but, as was true in the *Connolly* case, *supra,* the *Wilder* case, *supra,* and the *Small* case, *supra,* the defendant was a stranger, rather than a party, to the alleged violation and thus he could not successfully urge the violation as a defense. A reading of the Circuit Court's Opinion of June 23, 1958 (see Page 8a of Appendix A) very clearly indicates that its ultimate decision was somewhat dictated by the fact that it considered it to be an incongruous result to allow a party in *pari delicto* to avoid payment, whereas a stranger, innocent of any wrong-doing, would not be allowed to successfully urge a violation of the Sherman Anti-Trust Act of 1890 as a defense. The fallaciousness of the Circuit Court's reasoning in this respect is obvious. Whenever the illegality "inheres" in the contract,

(Continued on next page)

This is, the record clearly reveals, a situation where, *aliunde* the agreement, an integral portion of which the plaintiff seeks to enforce, there is no pre-existing agreement, combination, or conspiracy in restraint of trade in interstate commerce. The defendant and other onion growers, having been informed by the plaintiff and Sam Siegel that the latter would flood the onion market and thus depress the price unless the former agreed to purchase a portion of 600 carloads of onions owned, held or controlled by the plaintiff and Sam Siegel (App. 14a, 15a; Paragraph 1 of Affirmative Defenses) and facing the unhappy alternative of either purchasing a portion of said onions or suffering a severe pecuniary loss, (App. 15a; Paragraph 1 of Affirmative Defenses), became unwilling parties to an agreement and members of a combination and conspiracy to fix and manipulate the price of onions which constituted a part of interstate commerce (App. 11a; Paragraph 3 of Amended Answer; App. 15a, 16a; Paragraphs 4, 5, 7, and 8 of Affirmative Defenses). This combination and conspiracy literally arose by virtue of the agreement by the terms of which the defendant and

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(Continued from preceding page)

the aid of the Court is denied, in the language of this Honorable Court, at 29 S. Ct. 292 "not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties". Public policy considerations require that the courts allow those who are in *pari delicto* to remain in a *status quo* in order to deter future wrong-doers from entering into illegal contracts, but this consideration does not come into play in situations comparable to that found in the *Connolly* case, *supra*, for in the *Connolly* case, *supra*, while the Court undoubtedly would have refused to enforce the agreement which constituted a violation of the Sherman Anti-Trust Act of 1890, it refused to deny its assistance to the plaintiff in enforcing a separate and distinct contract of sale with the defendant. The Court, in essence, held that the plaintiff was not "an outlaw", to which the doors of the halls of justice would be forever closed, merely because of the fact that it had previously entered into an agreement in violation of the Sherman Anti-Trust Act of 1890.

the other onion growers made promises to purchase 287 carloads of onions and to refrain from selling these onions upon the futures market during the 1955-56 trading season, in return for which the *quid pro quo* to be received by them from the plaintiff and Sam Siegel, in addition to the promise of the latter men to deliver the onions, was their promise to forbear from selling any other onions owned, held or controlled by them during the balance of the trading season upon the futures market, the avowed and express object and purpose of the agreement being to create a fictitious market condition in onions, to fix the price at the then prevailing price or, if possible to increase the price (App. 11a, 12a; Paragraph 3 of Amended Answer; App. 15a, 16a; Paragraphs 3, 4, 5, 7 and 8 of Affirmative Defenses).

In view of the terms of this agreement and in view of the fact that the sale of the fifty (50) carloads of onions to the defendant was in pursuance of the agreement and was an essential part thereof, this Honorable Court's decision in the *Continental* case, *supra,* would certainly sustain the premise of defendant that a legally sufficient defense, invulnerable to attack by a Motion to Strike, was alleged and that the District Court erred in striking the Affirmative Defense predicated upon an alleged violation of the Sherman Anti-Trust Act.

In an apparent effort to avoid the inevitable consequences of applying the holding of this Honorable Court in the *Continental* case, *supra,* to the facts before it, the Circuit Court attributed to the word "inhere" a different meaning than that placed upon the term by this Honorable Court in the *Continental* case, *supra.* The Circuit Court, by ignoring the true purpose of the overall agreement between the plaintiff and Sam Siegel, on the one hand, and the defendant and the other onion growers, on

the other hand, sought to segregate and isolate the so-called condition of non-delivery from the other terms and conditions of the agreement and then concluded that the defendant's promise to pay for the fifty (50) carloads of onions was supported by the lawful consideration of the plaintiff's promise to deliver said onions (see Page 11a of Appendix A). The Circuit Court took the position that since the plaintiff was not seeking to enforce the mutual promises to refrain from delivering onions during the balance of the trading season upon the futures market, the illegality, if any, in these mutual promises was collateral to, rather than inherent in, the promise of the defendant to pay for the fifty (50) carloads of onions (see Page 11a of Appendix A) and that, accordingly, the defendant would not be allowed to import into the promise to pay the illegality, if any, embodied in the mutual promise to refrain from delivering onions for the balance of the trading season upon the futures market (see Page 11a, Appendix A). It is quite obvious that the conclusion reached by the Circuit Court herein is not supported by the decision of this Honorable Court in the *Continental* case, *supra*, for it is most important to observe that in the *Continental* case, *supra*, this Court held that the actual receipt (not merely, as herein, an unexecuted promise of the plaintiff to deliver) of the merchandise by the defendant was not a sufficient legal consideration upon which the duty of the defendant to pay could be enforced, since the rendering of a judgment for the plaintiff would be tantamount to affording him the aid of the judiciary in enforcing an agreement which is in direct violation of the Sherman Anti-Trust Act of 1890.

The Circuit Court primarily bottomed its conclusion that the assumed illegal condition or covenant, to-wit, that of non-delivery, could be separated from the lawful promise

for a lawful consideration upon the case of *Cincinnati, Portsmouth, Big Sandy, and Pomeroy Packet Co. v. Bay*, 200 U.S. 179, 26 S.Ct. 208 (1906), but the *Cincinnati* case, *supra*, unlike the *Continental* case, *supra*, is readily distinguishable from the case at bar in that in the former case, this Court, which was, at the outset, dubious as to whether the purchaser's agreement to maintain rates even pertained to Interstate Commerce, noted that said agreement to maintain rates was not alleged to have entered into the consideration of the sale, whereas here the promise of the defendant and the other onion growers to purchase the 287 carloads of onions was expressly alleged to be in consideration of the promise of plaintiff and of Sam Siegel not to deliver any of the onions owned, held or controlled by them upon the futures market for the balance of the 1955-1956 trading season (App. 11a, 12a, 15a).

PRAYER

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals for the Seventh Circuit

No. 12190 SEPTEMBER TERM, 1957, APRIL SESSION, 1958

VINCENT W. KASUGA,
Plaintiff-Appellee,
v.
JACK H. KELLY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 23, 1958

Before MAJOR, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an appeal from a summary judgment in favor of appellee (plaintiff) against appellant (defendant), entered October 11, 1957, in the amount of $37,342.80, with interest and costs. The action

was commenced September 11, 1956, and the judgment represents the balance due on a sale made December 17, 1955, by plaintiff to defendant, of fifty cars of onions.

If plaintiff was entitled to recover, there is no dispute as to the amount due as embodied in the judgment. The issues raised on this appeal require a statement of the salient facts which give rise thereto, as well as the essential proceedings in the District Court. The case was tried and decided upon the pleadings, which included plaintiff's complaint, defendant's answer thereto, certain affirmative defenses asserted by defendant, as well as a counterclaim by which defendant sought to recover damages against plaintiff in the amount of $75,000. There was submitted in connection with the counterclaim an affidavit by each of the parties.

On December 17, 1955, when the contract in dispute was made, plaintiff and his associate, Sam Siegel (the latter not a party to this action), were owners of actual onions in Chicago and elsewhere. Defendant was a grower of onions. Both parties were engaged in the marketing of onions in Illinois and in commerce generally throughout the country. By the terms of the contract plaintiff agreed to sell and defendant agreed to purchase fifty cars of onions at $960.00 per car, plus storage charges, or a total of $48,000, plus storage charges. The terms of sale were: initial cash payment, $300.00 per car, or $15,000; second payment to be made by January 10, 1956, of $200.00 per car, or $10,000; the balance of $460.00 per car, plus storage to be computed at the time defendant ordered the cars withdrawn from storage, or a total of $28,082.00. From time to time, defendant withdrew from storage, thirteen cars of onions. The payments made by defendant consisted of $7,500 on December 22, 1955, and $5,000 on January 18, 1956, or a total payment of $12,500. No further

payments were made as provided for in the agreement or for the thirteen cars of onions withdrawn by defendant from storage.

Onions, due to their perishable nature, can be kept in storage only for a reasonable period. On February 16, 1956, plaintiff sent a telegram to defendant, as follows:

> "Storage onions you purchased from me on 12-17-55 now showing deterioration. You agreed to order out of Chicago storage and pay for these onions during January and early February 1956. Present condition of onions require immediate action. Demand payment by 2-20-56 and will surrender negotiables upon receipt of payment."

On the same date, plaintiff wrote defendant, which in general was confirmatory of the telegram. On February 20, 1956, defendant responded by telegram, as follows:

> "Our agreement does not provide that onions be withdrawn from storage in substantial quantity by early February. We intend to abide by the original agreement and we expect you to do likewise."

Defendant, on March 9, 1956, notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. The reasons for such refusal will be subsequently noted under defendant's affirmative defenses.

The facts so far stated are conceded by defendant. In connection therewith it is pertinent to note that defendant makes no contention, either by allegation or otherwise, but that the price which he agreed to pay for the onions was the fair and reasonable cash market price. For reasons asserted in the affirmative defenses, defendant contends that payment of the balance due on the contract cannot be judicially enforced. Such defenses are predi-

cated upon an alleged factual situation from which it is argued that there was incorporated in and made a part of the sale agreement certain conditions in violation of anti-trust laws, both Federal and State (Illinois), as well as the Commodity Exchange Act. These affirmative defenses were, on motion of plaintiff, stricken by the court. We need cite no authority for the well established rule that all facts well pleaded must be taken as true. This is so even though plaintiff by answer has in large part denied defendant's allegations.

We find it difficult, as is often the case under similar circumstances, to separate facts well pleaded from those of a conclusory and argumentative nature. It appears, however, that the essential allegation of fact is that referred to as the non-delivery provision asserted to have been made at the same time and in connection with the sale of the onions. It appears from the briefs that each of the parties recognizes this provision as furnishing the principal bone of contention. Relative thereto, it is stated in defendant's brief that it was agreed by the parties that "the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season" (referring to onions owned and controlled by plaintiff and Siegel other than those involved in the sale to defendant), and that the defendant and other onion growers "agreed to purchase the 287 carloads of onions [this includes the 50 cars purchased by defendant] and to desist from selling them upon the futures market for the balance of the trading season in consideration of the promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the balance of the 1955-1956 trading season."

It is alleged as a legal conclusion, "The avowed and express object of said agreement was to fix the price of

onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce, and to create a false and fictitious market condition." In connection with this non-delivery provision, it is pertinent to note that each of the parties remained free to merchandise onions in normal commercial trade channels.

The District Court in a memorandum opinion reasoned that the Sherman Anti-Trust Act could not be asserted as a defense to the action for the unpaid balance of the purchase price, principally upon three grounds: (a) the so-called condition of non-delivery was not an inherent part of the sale and, thus, assuming the reciprocal agreement not to sell onions on the futures market during the balance of the 1955-1956 trading season was illegal, the obligation of defendant to pay was supported by other lawful consideration, to-wit, plaintiff's promise to sell the fifty carloads of onions at an agreed price; (b) the remedies provided by the Sherman Anti-Trust Act are exclusive and do not afford defendant the affirmative defense asserted, and (c) the so-called condition of non-delivery was not an illegal restraint of trade condemned by the Sherman Act.

In support of his position, plaintiff places great reliance upon *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, while defendant places equal reliance upon *Continental Wall Paper Company v. Louis Voight and Sons Company*, 212 U. S. 227. *Connolly* involved an action to recover the price of sewer pipe sold and delivered to defendant. The defense asserted that plaintiff was part of a monopolistic conspiracy and combine for the express purpose of limiting production of sewer pipe and increas-

ing the market price thereof, that the sale involved was at prices fixed by the monopoly in violation of the Sherman Act and, therefore unenforceable. The Court, in holding the defense not available, stated (page 551):

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

Continental involved an action to recover the alleged balance on an account for merchandise sold and actually delivered. Defendant as one of its defenses asserted that it, along with plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act and that the contract of sale was an inherent part of the illegal scheme. The Court sustained the validity of the defense, with a dissenting opinion by four members. The Court at great length distinguished the *Connolly* case, and discussed the situation before it as a basis for a holding contrary to that of *Connolly*, concluding such discussion as follows (page 260):

> "In short, the defense in the *Connolly* Case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress."

In *Continental,* both plaintiff and defendant were admittedly members of a combination and conspiracy in violation of the Anti-Trust Act. The Court emphasizes the particularly vicious nature of the violations in which the parties were engaged. As descriptive thereof the Court quotes from the Court of Appeals as follows (page 256):

> "'The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes.'"

After all is said and done, the essential distinction between *Connolly* and *Continental* is that in the former plaintiff was engaged in a rather innocuous form of violation of the anti-trust laws to which defendant, as buyer, was not a party, while in *Continental* plaintiff was engaged in a vicious form of anti-trust violation and defendant, as buyer, was a party to plaintiff's unlawful activities. It is also important that in *Connolly* recovery was sought for the fair and reasonable price of goods sold, while in *Continental* recovery was sought for the price which resulted from any was determined by the terms of the conspiracy in which the parties were participants. In the former, defendant was not permitted to plead plaintiff's anti-trust violation as a defense, while in the latter the same defense asserted by defendant was sustained. Thus, these two cases, as defendant would have them applied, lead to the incongruous result that a Court will lend its aid to enforce payment by a buyer innocent of wrongdoing but will deny its aid to enforce payment by a buyer who is a wrongdoer, that is, a party to and a part of a combination engaged in anti-trust violations. A reading of the cases subsequent to *Continental* demonstrates that the Courts generally, while recognizing its rationale, have in the main limited the case to its particular vicious facts. Its application has been denied under a variety of circumstances.

In *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, the Court rejected the defense of alleged violation of the Anti-Trust Acts. In doing so, we think it enlarged the doctrine of *Connolly* and at the same time limited that of *Continental*. The action was brought to recover the price of glucose sold to defendant. In defense it was claimed that plaintiff was part of a monopoly which had advanced the price of glucose and set up a profit-shar-

ing plan under which purchasers were required to buy all of their requirements from the combine, thus restraining competition in violation of the Sherman Act. The contract of sale permitted the purchaser to share in a profit-sharing plan of the seller, on condition that the purchaser use the seller's glucose exclusively. It was specifically provided in the contract for sale, "Goods herein sold are for your own consumption and not for resale." Thus, defendant (buyer) was by agreement with plaintiff (seller) restricted in its right to purchase as well as in the use of the purchased product.

The Court affirmed the action of the lower Court in striking the answer as being no defense, affirmed judgment for the price of the goods sold, and stated (page 172):

> "* * * the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431, applying them to the identical general question here involved."

The Court continued (page 172):

> "The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal

> contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Wilder,* the *Continental* case was relied upon in support of the defense, as it is here. Relative thereto, the Court stated (page 177):

> "But it is apparent on the face of the opinion in the *Continental Wall Paper* Case that it affords no ground for the extreme and contradictory conclusion thus deduced from it since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale."

It seems to us that the reasoning of the Court in *Wilder,* and particularly the appraisement which it made of its former opinion in *Continental,* is highly pertinent to the instant situation. Here, as in *Wilder,* there was a contract of sale. Plaintiff was to receive and defendant was to pay the fair market value of the onions. *Assuming that which*

we think doubtful, that is, that the non-delivery agreement was illegal, there is no more reason here than there was in *Wilder* for importing such elements of wrong into an otherwise legal and valid contract. More than that, the instant action is not to enforce the non-delivery provision but to enforce defendant's promise to pay. Such enforcement, as stated in *Wilder* (page 177), will not "sanction and give effect to a violation of the Anti-Trust Act inhering in the sale." This principle has been reaffirmed in *Bruce's Juices, Inc. v. American Can Co.,* 330 U. S. 743. In that case it was stated (page 755) that the Court would entertain a defense that the contract is illegal only where the suit "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought * * *." See also *United States Hoffman Machinery Corp. v. Valeteria Cleaners, Inc.,* 143 F. Supp. 797, 799.

Defendant challenges and seeks to disinguish the cases which we have discussed by arguing that the non-delivery provision of the contract was an integral part thereof, in other words, that because of such provision the entire contract is tainted with illegality and no part of it is enforceable. We do not agree with the premise upon which this contention rests. The non-delivery provision, while a part of the same contract, is separable from and not inherent in defendant's promise to pay the reasonable market price for the onions. A case in point is *Cincinnati, Portsmouth, Big Sandy & Pomery Packet Co. v. Bay,* 200 U. S. 179. In that case, the Court separated the legal from the illegal covenant and enforced the lawful promise made for adequate consideration even though an unlawful promise was made at the same time for the same consideration. In reference to one facet of the unlawful portion of the contract which appears to have been a price fixing condition, the Court stated (page 185):

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground."

Defendant also relies upon the Commodity Exchange Act (7. U. S. C. Par. 5, 13). It is contended that the contract in suit is in violation of that Act on the basis that the non-delivery provision created a "false and fictitious" market condition in onions by manipulation and increase in price. The contention with reference to this Act parallels that relative to the Federal Anti-Trust Act. Our discussion in connection with that Act is equally pertinent. In our judgment, and we so hold, the affirmative defenses predicated upon the Federal Anti-Trust Act and the Commodity Exchange Act are not available to defendant and such defenses were properly stricken by the District Court.

Defendant as a further affirmative defense also relies upon the Anti-Trust Act of Illinois (Chap. 38, Sec. 569, *et seq.*, Smith-Hurd Illinois Ann. Stat.). Section 573 declares that any contract or agreement in violation thereof shall be absolutely void. Section 574 provides that a purchaser of a commodity contrary to the provisions of the Act may plead the Act as a defense to any suit for the recovery of such price. Thus, the Illinois Act, unlike the Federal Act, specifically provides that a violation of the Act may be pleaded as a defense. The Illinois Act as the substantive law of the State is applicable only to intrastate commerce. Defendant apparently so recognizes and argues that such commerce was involved inasmuch as the contract of sale was made and was to be performed in the State of Illinois. Defendant makes this argument in spite of the

frequent allegations in his pleadings that "said onions which were the subject of said agreement and contract were a part of interstate commerce." In 15 C. J. S. Sec. 133 (b), it is stated that "state anti-trust laws do not apply to transaction involving interstate, * * *." It is hardly open to doubt but that the transaction in issue involved interstate commerce. It is, therefore, our view that the Illinois Act is without application.

Furthermore, the Illinois provision which makes a violation available as a defense has been narrowly construed by this Court. *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491. We held that the defense could not be raised in an action for the recovery of the purchase price of goods where it was not sought to enforce the illegal condition. We reasoned that the illegal covenant should, where possible, be separated from the valid promise to pay for the goods sold. As already shown, the Federal Courts have permitted recovery based upon the same reasoning.

We may add that a reading of the Illniois cases is convincing that the transaction in dispute is not violative of the Illinois Act, even though its applicability be assumed. In *Match Corp. of America v. Acme Match Corp.*, 285 Ill. App. 197, 204, the Court stated:

> "All contracts which on their face place a restriction upon the acts of the other party to the contract are necessarily a restraint to a certain extent. If the effect does not destroy competition and is merely intended to increase the business of the parties to the contract, and is only incidental to and found necessary in order to protect the parties' interest as set forth in the contract and does not tend to promote a monopoly, such provisions do not make the contract illegal and void."

See also *Moody & Waters Co. v. Case-Moody Pie Corp., et al.*, 354 Ill. 82, and *Southern Fire Brick and Clay Co. v. Garden City Sand Co., et al.*, 223 Ill. 616.

Lastly, defendant contends that its counterclaim was improperly dismissed. In this claim it was alleged that plaintiff violated the non-delivery provision of the contract by delivering onions on the futures market during the balance of the 1955-1956 trading season and that plaintiff disrupted the cash market of onions by selling and delivering unusual quantities below the prevailing price. The counterclaim does not alleged when this alleged breach on the part of plaintiff took place. Plaintiff in support of his denial of a breach submitted an affidavit which accounted for the fifty carloads contracted for by defendant. The affidavit shows that on or about February 7, 1956, thirteen carloads were withdrawn from storage by defendant; March 19, 1956, fourteen carloads were sold by plaintiff to Campbell Soup Company, and at a later date eight carloads were sold for cash to other onion brokers, leaving in storage fifteen carloads which had deteriorated to the extent that they could not be sold and were abandoned. Neither the manner of disposal of these onions by plaintiff nor the time is disputed by defendant.

The short and fatal answer to defendant's contention is that he first breached the contract. As heretofore shown, defendant agreed to an initital cash payment of $15,000, and a second payment of $10,000 by January 10, 1956. However, the total payment made by him was $12,500. Thus, defendant was in continuous default and breach of the contract from and after January 10, 1956. It is a well established principle that a party to a contract who commits the first breach of its terms cannot maintain an action for a subsequent breach by the other party. *Realty Acceptance Corp. v. Montgomery,* 51 F. 2d 636, 640; *Raybestos-Manhattan, Inc. v. Asbestos Textile Co., et al.,* 79 F. 2d 634, 637; *Sonken-Galamba Corp. et al. v. Butler Iron & Steel Co.,* 119 F. 2d 283, 286. Moreover, it must be remembered that

on March 9, 1956, defendant notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. At that time plaintiff was charged with the obligation of disposing of the onions at the best price available in mitigation of damages sustained by reason of defendant's breach. There is no allegation in the pleadings or affidavits that plaintiff acted improperly in the discharge of this obligation. In fact, as noted, plaintiff's affidavit, which is not denied, demonstrates that the onions (other than the thirteen cars for which delivery was accepted by defendant) were disposed of by plaintiff subsequent to the time when defendant refused to accept further delivery, and that defendant was given credit for the amount so realized. In our view, defendant's counterclaim failed to state an action upon which he was entitled to relief, and the claim, together with the answer thereto and affidavits submitted by the parties, demonstrates that there was no material issue of fact raised or involved.

In our judgment and we so hold, the District Court committed no error in striking the affirmative defenses pleaded by defendant or in dismissing his counterclaim. The judgment appealed from is AFFIRMED.

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Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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